UT 02-5
Tax Type: Use Tax
Issue: Use Tax On Out-Of-State Purchases Brought Into Illinois

STATE OF ILLILNOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE	) 02 ST 0000
OF THE STATE OF ILLINOIS	) IBT: 0000-0000
	) NTL # 00 000000000000000
v.	)
	) Mimi Brin
JOHN DOE	) Administrative Law Judge
Taxpayer	)

RECOMMENDATION FOR DISPOSITION

Appearances: Terry Rose Saunders and Thomas A. Doyle of Saunders & Doyle, for James E. Doe, taxpayer; Michael Abramovic, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

In July 2000, taxpayer, John Doe (hereinafter referred to as the "Taxpayer" or "Doe") filled out a Department of the Treasury United States Customs Service Customs Declaration (hereinafter referred to as the "Declaration") after arriving into Illinois from overseas through O'Hare Airport. On the declaration, he stated that he had purchased or acquired in another country, and brought into the United States, $4,175.00 worth of clothing, artwork and other items of tangible personal property. Based upon that declaration, the Illinois Department of Revenue (hereinafter referred to as the "Department") ultimately issued to Doe, on December 12, 2001, Notice of Tax Liability

number 00000000000000000 (hereinafter referred to as the "NTL"), for use tax of $260.00, penalty of $5.00, with statutory interest calculated to that date. Doe timely protested the NTL and argues that: 1) the Department failed in its initial burden to show a *prima facie* case that use taxes are properly charged herein; 2) that the Use Tax Act is an unconstitutional tax on imports; and, 3) that, as applied, the Use Tax Act violates the uniformity clause of the Illinois Constitution.

The parties agreed to submit this matter on stipulated facts[1] (hereinafter referred to as the "Stipulation") and memoranda of law.[2] Following the submission of the stipulation and a review of the record, it is recommended that this matter be resolved in favor of the Department on all issues. In support of this recommendation, I make the following findings of fact and conclusions of law:

Findings of Fact:

1. In July 2000, after visiting France, John Doe entered the United States through O'Hare Airport. Stipulation Ex. A-6
2. At all pertinent times, Doe represented that his country of residence was the United States and that his United States address was in Chicago, Illinois. Id.
3. Upon his arrival in the United States at O'Hare Airport, Doe filled out a Department of the Treasury United States Customs Service Customs Declaration, wherein he declared that "[t]he total value of all goods, including commercial merchandise, 1/we purchased or acquired abroad

[1] The parties submitted both a Stipulation of Facts and a Supplemental Stipulation of Facts, both being collectively referred herein as the "Stipulation".
[2] The Taxpayer's Memorandum of Law, filed August 23, 2002, is cited herein as "TP Memo"; the Department's Responsive Memorandum of Law, filed September 23, 2002, is cited as "Dept. Memo".

and am/are bringing to the U.S. is: $4175.00 (U.S. Dollars)" Id. at A-6, A-7

4. Doe advised that such goods included clothing, sunglasses, perfume, wine, artwork and "misc." Id. at A-7

5. A Department employee, Ms. Laima Jurkunas (hereinafter referred to as "Jurkunas"), reviewed taxpayer's declaration at the United States Customs Service office at O'Hare in either January or February 2001. Stipulation ¶¶ 1, 3

6. Jurkunas submitted taxpayer's declaration for audit, using Department computer software to calculate his use tax liability as well as to produce the corresponding use tax liability documents. Id. at ¶ 4

7. The documents so generated by the Department were: a) the EDA-94 auditor-prepared Use Tax Report; and, b) the ST-44 Rev. 01 Form 22 Letter, dated July 26, 2001. Stipulation ¶ 6; Ex. A-9, A-11

8. The Department sent the generated forms to Doe along with a sample ST-44 Illinois Use Tax Form and the Department's Informational Bulletin on the Illinois Use Tax for individual taxpayers. Stipulation ¶¶ 6, 11; Ex. A-13-18, 29

9. Prior to sending these materials to taxpayer, the Department conducted no other investigation into the goods that taxpayer brought into the United States as he set forth on his declaration. Stipulation ¶ 7

10. As his response to the documentation sent, Doe, on July 27, 2001, wrote a letter averring, *inter alia*, that the use tax assessment set forth in the

documents was "illegal and improper and will not be paid", was "arbitrary and discriminatory" and was made "without any reasonable basis… ." Stipulation ¶ 8; Ex. A-20

11. Taxpayer did not provide any books, records or other evidence, nor did taxpayer provide any explanation regarding the nature of the items declared, the circumstances of their coming into Doe's possession or what was done with the items.

12. The Department issued its NTL in this cause on December 12, 2001 (Stipulation ¶ 9; Ex. A-22), that taxpayer timely protested. Stipulation ¶ 10; Ex. A-25-26

13. The Department's Audit Correction and/or Determination of Tax Due is admitted into evidence pursuant to the Supplemental Stipulation of Facts, filed by the parties on September 4, 2002.

Conclusions of Law:

The Illinois Use Tax Act, 35 **ILCS** 105/1 *et seq*., (hereinafter referred to as the "Act" or the "Tax"), is a tax "imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer… ." Id. at 105/3 The "use" that triggers a taxable event means, in pertinent part, "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property… ." Id. at 105/2 There are statutory exceptions, including, *inter alia*, the purchase of property by a person for purposes of resale. Id. (see definitions of "use" and "sale at retail")

The tax, enacted in 1955, "functions as a necessary corollary to the Retailers' Occupation Tax Act (35 **ILCS** 120/1 *et seq.*), the principal means in Illinois for taxing the retail sale of tangible personal property. The purpose of the use tax is:

> "'primarily to prevent avoidance of the [retailers' occupation] tax by people making out-of-State purchases, and to protect Illinois merchants against such diversion of business to retailers outside Illinois.' Klein Town Builders, Inc. v. Department of Revenue, 36 Ill2d 301, 303, 222 N.E.2d 482 (1966).'"

Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, 418 (1996)

The use tax "falls alike on those who purchase at retail within the State and those who purchase outside of it." Turner v. Wright, 11 Ill.2d 161, 167 (1957) Thus, any tax advantage "enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State." Id.

Although the retailer is the mandated collector and actual remitter of the tax to the State, the "primary liability is incurred by the one who purchases for use." Klein Town Builders, Inc. v. Department of Revenue, 36 Ill.2d 301, 303 (1967) This framework is exemplified by § 3-45 of Act, that reads, in pertinent part:

> Collection. The tax imposed by this Act shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department under Section 6 of this Act, and shall be remitted to the Department as provided in Section 9 of this Act.
> The tax imposed by this Act that is not paid to a retailer under this Section shall be paid to the Department directly by any person using the property within this State as provided by Section 10 of this Act.

35 **ILCS** 105/3-45

Although the Act, itself, has been found to be constitutional, Turner v. Wright, supra; Burgess-Norton Mfg. Co. v. Lyons, 11 Ill.2d 294 (1957), it has been challenged, not infrequently, including challenges premised upon constitutional grounds. In the

instant matter, taxpayer avers that the use tax, as applied in this matter, is an unconstitutional tax on imports, prohibited by the Import-Export Clause of the United States Constitution, Art. I, § 10, cl.2[3] In this regard, Doe argues that the Act may not be used to impose taxes solely on the basis of the declaration and without regard to whether the goods stayed in Illinois, that the Act discriminated against imports from other countries because there was no offset for credit based upon sales tax paid in other countries and because of this state taxation of imports, the federal government's ability to develop a uniform trade policy is jeopardized. TP Memo p. 4

Doe relies on Michelin Tire Corporation v. Wages & Tax Commission, 423 U.S. 276 (1976), to support these positions. In the Michelin case, the United States Supreme Court affirmed the imposition of a Georgia ad valorem tax on imported tires that had been challenged as being in violation of this particular constitutional provision. In that case, the petitioner was an importer and wholesale distributor operating in the United States through distribution warehouses in various areas of the country. Distribution and sales from the Georgia warehouse were limited to franchised dealers in six southeastern States. Id. at 280 The items were brought into the United States and ultimately to the warehouses, factory packed and sealed, and after an import duty was paid. Id. Upon arrival at the distribution warehouse, the tires were unpacked and placed into petitioner's inventory without segregation from other tires. Orders were filled without regard to where the tires were manufactured or how they arrived. Id. at 281

[3] This provision reads:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul [sic] of the Congress.

In writing for the court, Justice Brennan discussed at length, the history, prior to the enactment of the Import-Export Clause, of the effects of the taxation of foreign commerce by various port states and how this impacted on the treasury of other states as well as that of the federal government. He wrote, as well, on how such varied taxation impacted the federal government's ability to enter into treaties regulating foreign commercial relations. He concluded that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." Id. at 286 The court further stated:

> Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.

Id. at 287

Justice Brennan cited Chief Justice Taney in License Cases, 5 How. 504, 576 (1847), as the authoritative opinion as to whether nondiscriminatory ad valorem property taxes are prohibited by the Import-Export Clause, as follows:

> Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property

> of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State.

Michelin Tire, supra at 300-01

Justice Brennan concluded that "nondiscriminatory ad valorem property taxes are not prohibited by the Import-Export Clause." Id. at 301 As such, the Court determined that:

> Petitioner's tires in this case were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export Clause of the Constitution.

Id. at 302

It is clear from the Supreme Court determination in Michelin that the Import-Export Clause of the U.S. Constitution was intended to apply to those items of tangible personal property that, as imports, remain in transit, that is still within the commerce stream. However, the protection against state taxes, such as the Illinois use tax, afforded by this constitutional provision, no longer exists after the goods are placed into the use for which they were intended. In the case of an importer or distributor, that use is until the time the importer or distributor places the property into inventory for its intended use, that is, for sale. Likewise, in the case of an Illinois purchaser who has imported goods from outside of the United States, the protection exists only until such time that the purchaser uses the goods for the purposes intended, including for personal use. See

Caterpillar Tractor Co. v. Department of Revenue, 47 Ill.2d 278 (1970)[4] (use tax applied upon the first use made of the tangible personal property by the purchaser who had imported the equipment from outside of the United States)

Further, as part of its determination that ad valorem taxes are not, per se, prohibited by the Import-Export Clause, the Michelin Court also notes the concern of the Framers of the Constitution regarding the need for the federal government to "speak with one voice when regulating commercial relations with foreign governments… ." Michelin, supra at 540-1 Justice Brennan dispelled this concern in his inclusive statement that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." Id. at 541 See also Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986) (affirming the constitutionality of a Florida statute providing for state sales tax on sale of aviation fuel sold within the state regardless of whether fuel was used to fly within or without the state, or whether the airline engaged in a substantial or a nominal amount of business within the state; determined that the imposition of the tax did not threaten the ability of the Federal Government to "speak with one voice" on reciprocal tax exemptions for aircraft, etc. that constitute instrumentalities of international air traffic")

Based upon the above, taxpayer's attempts to invoke the Import-Export Clause of the U.S. Constitution as evidence of the unconstitutional imposition of the use tax in this case, fails. First, taxpayer failed to provide any information to the Department as to the

[4] This case precedes the Michelin decision and abides by the "original package" doctrine that heretofore appeared to be the formula used to determine when imported goods were no longer deemed "imports", and

nature of the tangible personal property he identified as having acquired outside the country. This is in spite of the specific request made by the Department prior to the issuance of the NTL. As a result, there is no reason to consider Doe similar to an importer or distributor, who brings goods into the country for commercial purposes, and who does not use the goods, for its own benefit, prior to the goods continuing in the commerce stream as imports. Likewise, there is no reason to presume, based upon the lack of evidence presented by this taxpayer, that he did not put the goods he brought into Illinois to the use intended when he acquired them, *i.e*. his own personal use. Therefore, in this case, just as in the Michelin matter, the Illinois use tax correctly applies.

Further, there is also no evidence provided by the taxpayer, either in this forum or to the Department prior to the issuance of the NTL, to support his premise that the use tax violates the Import-Export Clause because there was no offset for foreign sales tax paid. An offset for use-type taxes paid elsewhere arises out of a concern against multiple taxation. 35 **ILCS** 105/3-55 There is simply no evidence that Doe paid any foreign tax, let alone a tax similar to the use tax, on the items declared. As such, this taxpayer lacks standing to raise this issue, a point suggested by the Department. Dept. Memo p. 8

Under the facts of this matter, the standing issue takes on importance. The issue of whether a complainant has standing to raise a matter "is designed to insure that the courts are accessible to resolve actual controversies between parties and not 'address abstract questions, moot issues, or cases brought on behalf of others who may not desire judicial aid.'" (citation omitted) Owner-Operator Independent Drivers Association v. Bower, 325 Ill.App.3d 1045, 1050 (1st Dist. 2001) "To have an actual controversy", the complaining party "must show that the underlying facts of the case are not moot or

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therefore, not amenable to the imposition of use taxes. Michelin dispels the use of that doctrine as formula.

premature; there must be a concrete dispute that admits of an immediate and definitive determination of the party's rights." (citation omitted) Id. To have standing, a party "must have a recognizable interest in the dispute peculiar to itself and capable of being affected." Id. Nor can a party "gain standing merely through a self-proclaimed interest or concern about an issue, no matter how sincere." Glisson v. City of Marion, 188 Ill.2d 211 (1999)

Doe does not have such an interest on the issue of an offset for foreign sales tax paid because there is nothing in the record indicating that he paid any type of tax, whatsoever, on the items he declared. As such, he attempts to raise an issue that is in the abstract as to himself, the resolution of which will have no impact on his dispute with the Department in this matter. There is no indication, at all, that Doe will sustain or be in any immediate danger of sustaining, a direct injury of multiple taxation as a result of a finding upholding the use tax on his purchases. Owner-Operator Independent Drivers Association, supra at 1050; Lake County Riverboat L.P., by FRGP, L.P. v. Illinois Gaming Board, 332 Ill. App.3d 127 (1st Dist. 2002) Consequently, there is no basis to consider taxpayer's concerns in this matter regarding the constitutionality under the Import-Export Clause of the U.S. Constitution of a lack of credit for foreign sales tax paid.

Taxpayer also complains that the use tax, as applied in this cause, violates the uniformity clause of the Illinois constitution that provides:

> In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

Ill. Const. art. IX § 2 The Illinois Supreme Court has determined that, in analyzing a matter with regard to the uniformity clause, the appropriate test to be applied is that the "classification must be based on a 'real and substantial difference between the people taxed and those not taxed, and that the classification must bear some reasonable relationship to the object of the legislation or to public policy.'" (citations omitted) Searle Pharmaceuticals, Inc. v. Department of Revenue, 117 Ill.2d 454 (1987)

Taxpayer specifically avers that the Department does not assess use taxes against passengers on the tangible personal property purchased out of the state or out of the country, after the passengers arrive in Illinois through O'Hare Airport from domestic locations, or have cleared customs in New York or Los Angeles. Therefore, this taxpayer offers, in assessing use tax against those persons who arrive at O'Hare Airport and clear customs in Illinois, the Department has created an "indefensible classification". TP Memo p.5

In support of this position, Doe relies on the recent Illinois appellate court case, U.S.G. Italian Marketcaffe LLC v. City of Chicago, 332 Ill.App.3d 1008, 775 N.E.2d 47 (1st Dist. 2002) In that matter, the plaintiffs' complaint concerned a City of Chicago ordinance that created the "litter tax". The tax was imposed on the sale at retail of food prepared for immediate consumption by a place for eating. The ordinance exempted certain retail sales of food, the primary exemption being for "food that is not 'carry-out food' and is sold for consumption at the place for eating." Id. at 775 N.E.2d 48 Further, under the ordinance, the tax was not imposed upon those businesses that serve only carry out food, that is, businesses without facilities for on-premises consumption. Id. The plaintiffs argued, successfully, that because the tax was imposed on some, but not all

sellers of the same commodity, the real and substantial difference requirement of the uniformity clause was violated.

While this taxpayer correctly sets forth the appropriate test for an analysis of whether a law violates the uniformity clause of the Illinois constitution, his reliance on the U.S.G. case is misplaced. First, the Act plainly provides that the tax is "imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer… ." 35 ILCS 105/3 Although there are statutory exemptions, none distinguish between tangible personal property purchased in other states or other countries. Therefore, the Act, itself, unlike the city ordinance in U.S.G. or the income tax statute at issue in Searle, is neutral on its face and applies across the board to all such items purchased outside of Illinois and brought into Illinois for use by all Illinois residents. This is reinforced by the Department documents provided of record, that the parties stipulated were received by the taxpayer, the Illinois Use Tax, Information for Individual Taxpayers (Stip. Ex. A-13-14)[5]; and the Department Informational Bulletin FY 95-30.

What taxpayer appears to argue is not that the use tax statute, itself, is unconstitutional, but, rather, that persons who purchased tangible personal property outside of Illinois and file declarations at O'Hare Airport are treated differently from such persons who arrive at O'Hare who do not file declarations (that is, arriving from

[5] For example, the Department advises that:

> Since 1955, Illinois law has required you to pay tax at Illinois rates on purchases you make for use or consumption in Illinois
>
> When you buy good from businesses located outside Illinois and bring them into Illinois or
>
> When you have the goods delivered to you from businesses located outside Illinois.

other U.S. locations), or arrive at O'Hare after filing customs declarations in other states. His complaint, therefore, appears to concern the enforcement of the statute.

As such, Doe's complaint is more akin to that of the appellee in Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410 (1996). In that matter, the Department assessed Brown's Furniture, Inc., a Missouri retailer, for uncollected use tax on sales of furniture it made and delivered to Illinois residents. Id. at 417 As part of its protest of the assessment, Brown's averred that, at the time of its audit, the Department did not require other similarly situated Missouri retailers to collect Illinois use tax and, therefore, that the Department's "targeting" and "singling out" of Brown's Furniture denied it the equal protection of the laws" under both the U.S. and Illinois constitutions.[6]

In rejecting Brown's argument, the court stated that "so long as a statute is rationally based, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.'" (citations omitted) Id. at 430 That court further determined that the Department's legitimate objective of collecting revenue, in addition to the Department's finite resources, "necessarily requires it to exercise some discretion in selecting" who to audit. Id.

The same logic applies in this matter. In the material provided to the taxpayer by the Department, it is explained that:

> Using goods purchased tax free or at lower rates outside Illinois is unfair to retailers, consumers, and the taxpayers in the following ways:
>
> - Illinois retailers, who must charge sales tax, must compete with out-of-state retailers, who may charge no sales tax or at rates less than Illinois rates.
> - Illinois must make up lost revenues or curtail state services provided to consumers and taxpayers.

Stipulation Ex. A-14

Every taxpayer, including this one, is further informed that:

> Illinois is aggressively focusing upon collecting this tax.
>
> - Illinois shares sales information with other states and bills Illinois residents for unpaid tax, penalty, and interest.
> - Illinois gathers information on overseas purchases from the U.S. Customs Service.

Id.

Illinois law provides that the use tax applies to persons who purchase goods outside of Illinois and bring them into Illinois for use. This law applies whether you purchased the goods in Indiana or in Ireland, and the purchaser is required, in either situation, to file a use tax return with the State. 35 **ILCS** 105/10 The law, as written, is constitutionally sound.

There are, nonetheless, obvious limitations on how the Department can insure that persons are paying this tax to Illinois-it is simply not imaginably possible to have Department personnel at each plane or train arrival at each airport and rail station checking each passenger and each piece of luggage. Nor is it possible to have Illinois borders monitored for Illinois residents entering on the roads from domestic locations. There is a certain amount of self-reporting that all governments must rely upon. This does not mean, however, that when the Department does attempt to enforce the law through means readily available, such as checking self-reporting customs declarations at the airport, that it is invidiously enforcing the Act. On the contrary, it indicates that the Department, given practical parameters, is using the most efficient method to enforce its statutory mandate to collect the tax, when it is applicable.

The law, then, is also constitutional in its application. The taxpayer's argument regarding a perceived violation of the Illinois uniformity clause, therefore, fails.

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[6] U.S. Const. Amend. XIV; Ill. Const. 1970, art. I § 2

The last of the issues raised by the taxpayer is that the Department failed to show that the use tax applies to the goods declared by Doe. As part of this argument, he states that the Department "bears the initial burden to show a *prima facie* case that use taxes are properly charged" and cites as authority Department regulation 86 Ill. Admin. Code, ch. 200, § 200.155 (a). TP Memo p. 2 This taxpayer also avers that since there is nothing in the record to support a finding that the goods declared were purchased at retail from a retailer, or that Doe, himself, used the goods, or even that the goods were used in Illinois, the Department acted "arbitrarily" and "capriciously" in assessing tax, penalty and interest. TP Memo pp.2-3

These arguments also fail. Taxpayer correctly states that, in order for the use tax to apply, tangible personal property must be purchased at retail from a retailer, 35 **ILCS** 105/3, and used (the exercise of ownership rights (id. at 105/2)) in Illinois. Doe is incorrect, however, when he argues that the Department bears the initial burden of proving these specific elements in order to show a *prima facie* case that the tax is properly assessed, and, further, that without such a showing, the taxing body has acted arbitrarily and capriciously.

In support of his averment that the Department bears the initial burden for a *prima facie* case based upon proof of specifics, he cites to Department regulation 200.155 (a). This regulatory provision is in the Practice and Procedure part of the administrative code for the Department of Revenue, and is specifically found under that section that details evidence and conduct of hearings. In pertinent part, that regulation states that "[t]he order in which evidence is to be presented shall be determined by the party which, at a given point, must sustain the burden of proof."

In accord with this, the taxpayer is again correct in stating that the Department has the initial burden in setting forth a *prima facie* case that the assessment is correct. Both the Illinois legislature and the Illinois courts have clearly established exactly what is required of the Department for that *prima facie* showing.

The Use Tax Act incorporates certain provisions of the Retailers' Occupation Tax Act, 35 **ILCS** 120/1 *et seq*. (hereinafter referred to as the "ROT and ROTA"). 35 **ILCS** 105/12 Pursuant to the ROTA, in the situation wherein a person fails to make a return when required:

> the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax dues, as shown in such determination.

35 **ILCS** 120/5

As far back as 1938, Illinois courts have consistently held that the Department's corrected return suffices as its *prima facie* showing that the tax shown to be due is correct. Nothing more is required of the Department. Anderson v. Department of Finance, 370 Ill. 225 (1938) The burden then shifts to the taxpayer to overcome the presumption of validity attached to the Department's corrected return, Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968), with competent evidence, identified with its books and records, showing that the Department's returns are incorrect. A.R. Barnes and Co. v. Department of Revenue, 173 Ill. App.3d 826, 832 (1st Dist. 1988)

In the instant matter, the parties stipulated to the Notice of Tax Liability issued by the Department against Doe, Stipulation Ex. A-22, as well as to the Department's Audit Correction and/or Determination of Tax Due. Supplemental Stipulation of Facts Pursuant to both legislative mandate and court interpretation, the Department has

presented its *prima facie* case and the amount of use tax assessed is deemed to be correct and is deemed to be due.

The taxpayer now has the burden to rebut this *prima facie* showing. A.R. Barnes and Co., supra; Illinois Cereal Mills, Inc. v. Department of Revenue, 99 Ill.2d 9 (1983) Doe does this by stating, essentially, that the Department's assessment is wrong, because it failed to establish the statutory elements necessary before the use tax applies. However, this purported requirement is specifically not required by the law. A.R. Barnes and Co., supra; see also Branson v. Department of Revenue, 168 Ill.2d (1995) (under personal liability statute of ROTA wherein the Notice of Penalty Liability is given *prima facie* correctness, all elements necessary for personal liability are subsumed in the notice, thereby establishing a *prima facie* case for liability without any further showing by the Department) What is required, is that the Department's assessment meet minimum standards of reasonableness, a matter not specifically argued by this taxpayer, but, implied by his statement that "[w]hen a taxing authority imposes taxes and seeks interest and penalties without a proper evidentiary basis to do so, it acts arbitrarily and capriciously." In support of this proposition, taxpayer relies on R.E. Dietz Corporation v. United States, 939 F.2d 1 (2nd Cir. 1991)

The review of the facts of this instant matter are necessary for a proper analysis on this point. The parties agree that the Department's initial contact with Doe regarding the goods he declared as acquired outside of the United States and brought into Illinois, resulted from a review of customs declarations at O'Hare Airport. The parties stipulate that prior to the issuance of the NTL protested herein, the Department sent a letter to Doe on July 26, 2001, wherein it informs that the Department determined that taxpayer

purchased tangible personal property in a foreign country and brought it into Illinois. Stipulation Ex. A-11 That document also states, on its face:

> Auditor-prepared Use Tax Return (EDA-94) is enclosed. Please review this return. If you agree with the Department's determination, sign the EDA-94 and return with your remittance… .
> If you do not agree with the Department's determination, return the unsigned EDA-94 form with an explanation and documentation to support the legal basis for your disagreement.
> Please forward the requested information in the enclosed envelope within 30 days from the date of this letter.

The document then provides the auditor's name and telephone number for purposes of taxpayer contact for questions. At the same time, taxpayer received the Department informational material regarding the use tax, including information as to when and why it applied. The parties stipulate that taxpayer's response was, with no factual or other specific elaboration, that the tax assessment was "illegal", "improper" and would "not be paid". Stipulation Ex. A-20 The record does not provide that any further information was exchanged between the parties, and the NTL was issued on December 12, 2001.

The parties have failed to cite, nor am I aware, of any Illinois cases under the Act or the ROTA, wherein the taxpayer prevailed in a claim that the Department's assessment was not minimally reasonable, when the taxpayer failed to provide information regarding its taxed activities. Quite the opposite is true. See Puleo v. Department of Revenue, 117 Ill. App.3d 260 (4th Dist. 1983) (if taxpayer produces no records, the Department may rely even on hearsay in producing its corrected return; taxpayer's general denial that assessment is incorrect is not sufficient to rebut the *prima facie* case); Quincy Trading Post, Inc. v. Department of Revenue, 12 Ill. App.3d 725 (4th Dist. 1973) In the instant matter, despite the Department's attempts to get specific information about the

declaration prior to the issuance of the assessment, Doe refused to provide any, and, in fact, has not to this date, provided any information concerning these items. His bald assertions of unlawfulness, *etc*. cannot be sustained when he refuses to discuss the specifics of the items, and he is the only one with control of those facts. Illinois courts have repeatedly affirmed that mere oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations, Puleo v. Department of Revenue, supra; Rentra Liquor Dealers, Inc. v. Department of Revenue, 9 Ill. App.3d 1063 (1st Dist. 1973); A.R. Barnes & Co. v. Department of Revenue, supra, in this matter, even mere oral testimony is absent.

Nor does R.E. Dietz Corporation, supra, assist Doe in his arguments. In that matter, the taxpayer sought a refund of overpaid federal taxes and interest. Specifically, the Internal Revenue Service had determined that for the years at issue, certain interest income earned by the taxpayer's foreign corporation in offshore bank accounts, should be included in taxpayer's gross income, and the I.R.S. had issued a notice of deficiency for this income inclusion. The particular revenue code provision in controversy, I.R.C. § 954 (b)(4), required that for this income to be properly included in taxpayer's gross income, the internal revenue service Commissioner was to be satisfied that there was not one significant tax reduction purpose in engaging in the particular transactions that resulted in the income. R.E. Dietz Corporation, supra at 4-5

The reviewing court fully accepted certain basic tax principles wherein it stated that "[r]egarding the burdens of proof in a refund action, the notice of tax deficiency carries a presumption of correctness, requiring the taxpayer to demonstrate that the deficiency is incorrect (citations omitted). The taxpayer bears the burden of persuading

the trier of fact that the assessment is incorrect." Id. at 4 The court further stated that although the Commissioner's assessment was entitled to an "appropriate amount of deference", when challenged, the proper standard of review of the assessment was that of arbitrary and capricious. Id. at 5 That reviewing court determined that given the facts of the case as established by the record provided by the taxpayer, the trial court correctly found that the "significant purpose" for the establishment of the offshore accounts was the "survival of the business during an economically tumultuous period", and, therefore, it was arbitrary and capricious for the Commissioner to conclude that the taxpayer had any significant tax reduction purpose in establishing the accounts at issue. Id. at 9

Certainly, the Dietz case is not in conflict with this instant matter. As discussed above, when challenged, a Department assessment must meet a standard of minimum reasonableness. When this standard is applied to the facts herein, I can only conclude that the standard has been met. As stated previously, Doe failed to provide the Department with any information about the items he self-reported on his declaration, in spite of the fact that the Department requested the information before it issued the NTL, and after sending him detailed information regarding when, why and how the use tax applied.

Doe's position is that he is not required to give the Department any information, despite the fact that he admitted that he brought purchased or acquired tangible personal property into Illinois from outside of the state. Surely, if he had not purchased the goods from a retailer, or if there were any other reason why the use tax should not apply, he had full opportunity to so advise the Department. After all, the taxpayer, not the Department, has total control over the facts. Had Doe provided the information, and the Department

thereafter issued the NTL, the assessment may very well be amenable to a review based upon minimum reasonableness. However, since the taxpayer has never provided any information about the goods, even in this forum, the seminal principles of tax law apply- that is, the assessment is *prima facie* correct and the taxpayer bears the burden of proof to demonstrate otherwise. In this case, the taxpayer has failed to rebut the statutory correctness of the NTL.

WHEREFORE, for the reasons stated above, it is recommended that Notice of Tax Liability 00 000000000000000 be finalized, as issued.

11/12/02

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Mimi Brin
Administrative Law Judge